Supreme Court, U.S.
FILED

94 210 AUG - 1 1994

OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

WILLIAM JAMES DAVIS, JR.

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES W. PARKMAN, III
401 NORTH FOSTER STREET
DOTHAN, ALABAMA 36303
(205) 793-9009

32 pp

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

WILLIAM JAMES DAVIS, JR.

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES W. PARKMAN,III
401 NORTH FOSTER STREET
DOTHAN, ALABAMA 36303
(205) 793-9009

STATEMENT OF THE ISSUES

I. WHETHER THE APPELLANT IS ENTITLED TO REDUCTION IN SENTENCE DUE TO THE INCORRECT "DOLLAR LOSS" ATTRIBUTABLE PURSUANT TO U.S.S.G. SECTION 2F1.1.

II. DOES A CONFLICT EXIST IN THE DECISIONS OF THE VARIOUS CIRCUIT COURTS OF APPEAL, AND HAS THE COURT OF APPEALS FAILED TO RECOGNIZE THE UNITED STATES SENTENCING COMMISSIONS AMENDMENT ADDRESSING THAT CONFLICT.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....2

SUMMARY OF JURISDICTION.....5

STATEMENT OF FACTS MATERIAL TO THE ISSUES.....7

REASONS FOR ALLOWING WRIT OF CERTIORARI.....10

ARGUMENT.....15

CONCLUSION.....26

APPENDIX.....28

TABLE OF AUTHORITIES

United States v. Brach, 942 F.2d 141,143 (2nd Cir.1991).....25

United States v. Cockerham, 919 F.2d 286, 289 (5thCir.1990).....25

United States v. Gallegos, 975 F.2d 710, 712 713 (10th Cir.1992).....12,18,19, 20,21,22,23,24

United States v. Gennuso, 967 F.2d 1460, 1461-1463 (10th Cir.1992).....19,20

United States v. Kopp, 951 F.2d 521, 531-32 (3d Cir.1991).....23,25

United States v. Menichino, 989 F.2d 438, 441 (11th Cir.1993).....18,19,22

United States v. Rothberg, 954 F.2d 217, 218-19 (4th Cir. 1992).....25

United States v. Schneider, 930 F.2d 555, 557-58 (7th Cir.1991).....25

United States v. Shaw, 1993 WL 312206 (9th Cir.Cal.).....22,23,24

United States v. Smith, 951 F.2d 1164, 1166 (10th Cir.1991).....25

OTHER AUTHORITY

18 U.S.C. Section 1344.....11,15

Amendment 393.....14,25

Rule 35-5 United States Criminal Code.....8

U.S.S.G. Section 2F1.1.....10,11,13,14,17,24,25

TO THE SUPREME COURT OF THE UNITED STATES

COMES NOW your Petitioner, William James Davis, Jr., and petitions this Honorable Court for a Writ of Certiorari to issue in the above styled cause under Rule 14, Federal Appellate Rules of the United States, and shows the following:

SUMMARY PROCEEDINGS BELOW

1. On May 10, 1994, the Court of Appeals for the Eleventh Circuit affirmed the decision of the trial court, without opinion in case number 93-63 (01)-S, attached as Appendix "A" and denied an Application for Suggestion of En Banc Hearing on July 7, 1994.

2. Your Petitioner maintains that the trial court erred and that the decision of the Court of Appeals for the Eleventh Circuit is in conflict with prior decisions of the Circuit Courts of Appeal in prior decisions of similar cases.

3. Your Petitioner further contends that there exists a conflict in the decisions of cases of similar standing among the various Circuits and that the conflict has been addressed by the United States Sentencing Commission.

STATEMENT OF JURISDICTION

On May 10, 1994, the Eleventh Circuit Court of Appeals affirmed the decision of the trial court, and overruled the Application for En Ban Rehearing on July 7, 1994.

This Petition for Writ of Certiorari is pursuant to the Due Process Clause of the Fifth Amendment to the Commission of the United States, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Miitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation, and the Equal Protection Caluse of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

All persons born or natualized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, libery or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS MATERIAL TO THE ISSUE

William James Davis, Jr. and Robert David Price were named in a fifteen (15) count indictment filed in the Middle District of Alabama on February 10, 1993. Counts One (1) through Fifteen (15) charged that the defendants did knowingly and willfully execute and attempt to execute a scheme to defraud and obtain money under the custody and control of the First Bank of Dothan, Alabama and SouthTrust Bank of Dothan, Alabama. Prior to discovery of the scheme by First Bank of Dothan, Davis informed the bank of the scheme and made substantial restitution payments and the bank converted the balance of the "loss" to an "open account". Davis continued to pay down the open account prior to the involvement of the United States, through the bank examiners report to the Federal Bureau of Investigation.

At the Sentencing Hearing, the President of

First Bank of Dothan appeared in court to testify that through Davis' honesty and forthcoming the bank "expected no loss" as a result of the scheme.

On April 7, 1993 in accordance with the terms of a written plea agreement, the defendant, William James Davis, Jr. pled guilty to Count One (1) of the indictment. The terms of the plea agreement called for the dismissal of the remaining counts and full restitution to be paid to the victim in this case. The plea agreement also called for the defendant to submit a financial statement to the probation officer at the time of the defendant's plea. The terms of the plea agreement also stated that either prior to sentencing or according to Rule 35 of the United States Criminal Code, the government may make a motion for a downward departure based on the defendant's substantial assistance. The defendant was sentenced on July

14, 1993 before the Honorable Myron H. Thompson, Chief United States District Judge. The defendant was sentenced to 6 months imprisonment, but at the request of the defense counsel, was released pending appeal.

REASONS FOR ALLOWING WRIT OF CERTIORARI

The record will show that the Petitioner's Appeal to the Eleventh Circuit Court of Appeals was denied on May 10, 1994, and the Suggestion of En Banc Hearing was overrulled on July 7, 1994.

The issues presented for review by this Honorable Court are of Constitutional proportions and there is conflict within the circuits as to the issue of the Application of Section 2F1.1 of the U.S.S.G.

SUMMARY OF THE ARGUMENT

The appellant pled guilty on April 7, 1993 to one count of Bank Fraud, 18 U.S.C. Section 1344. The appellant was then sentenced on July 14, 1993 to six months imprisonment and four months home detention after objections and a sentencing hearing. Basically, there were three issues presented to the Eleventh Circuit for review concerning Appellant's sentence.

First, on a case of first impression, Petitioner contended that the amount of "loss" used in determining the category in U.S.S.G. Section 2F1.1 for sentencing purposes was an incorrect attributable figure. The evidence indicates that several fraudulent drafts, amounting to total of $141,700.00, were deposited, with immediate withdrawals from the bank. Prior to any charge against the petitioner, the bank was notified by the petitioner and the bank put the fraudulent draft

amount on an "open account". The petitioner then paid back the bank $94,502.75 on all of appellant's accounts with the bank giving petitioner credit of $16,399.05 of that total towards the draft amounts. Again, this was done prior to any government involvement. Based on the total amount paid toward the drafts by the petitioner, the bank then sued this petitioner claiming a "loss" of $85,595.95. The petitioner only actually received $44,910.00. When determining the greater of actual or intended loss, the petitioner contends any actual loss should equate to net value. United States v. Gallegos, 975 F.2d 710 (10th Cir. 1992). Therefore, the District Court should not have used the "loss" figure of $141,700.00 since this is not the actual loss to the bank or the intended loss by Petitioner. The options available consist of:

A. No "loss" to the bank since no loss

was intended by Petitioner and the bank placed all sums on "open account";

B. The loss of $85,595.95 which is the amount sued for and its actual loss; or

C. The loss of $28,510.95 which represents the difference between restitution paid by Petitioner and the actual amount received from the fraudulent drafts by this petitioner. (To date, only Petitioner Davis has repaid any monies to the bank).

Accordingly, the loss amount to be used in determining the range of punishment under Section 2F1.1 of the U.S.S.G. has been addressed in the various Circuits using different criteria in each of those Circuits.

The United States Sentencing Commission addressed the conflict among the Circuits and issued Amendment 393 to 2F1.1 of the U.S.S.G. in an effort to resolve any conflict.

In the instant case, the Court of Appeals

for the Eleventh Circuit has not recognized that Amendment and applied it to the facts in Petitioner's case.

ARGUMENT

The petitioner would aver that he is entitled to a reduction in sentence due to the incorrect "dollar loss" attributable pursuant to U.S.S.G. Section 2F1.1.

The evidence presented at the Sentencing Hearing reveals that the petitioner pled guilty to one count of an indictment for bank fraud, 18 U.S.C. Section 1344, involving fraudulent sight drafts presented to a bank. The uncontested evidence further shows that:

A. The total amount of these fraudulent drafts presented to the bank was $141,700.00.

B. Of these drafts' total of $141,700.00, this petitioner only actually and personally received $44,910.00 with the difference being obtained by the Co-Defendant, Robert David Price.

C. That this petitioner, months prior to any arrest, charge or indictment paid the bank a total of $94,502.75.

D. That as of the date of sentencing, the petitioner had personally repaid the bank a total of $105, 624.63.

E. That the bank applied all amounts for all fraudulent drafts on an "open account" in Petitioner's name at the bank and therefore there was never any intended loss by Petitioner.

F. Based on undisputed evidence, from the total of all monies repaid to the bank by Petitioner, the bank selected and applied $16,399.05 to the fraudulent drafts and applied the remainder of the petitioner's repayments to other loans and notes of Petitioner at the bank.

G. That prior to any charges, the bank involved in this case filed a lawsuit against Petitioner in January, 1993 for repayment of these fraudulent drafts, which were placed on account, alleging that the amount owed the bank was only $85,595.95. This amount represented the difference between the total amount of

fraudulent drafts ($141,700.00) and the amounts which the bank received from Petitioner and applied directly to these drafts.

With these facts established, the issue clearly involves the dollar amount of "loss" to determine the offense level pursuant to U.S.S.G. Section 2F1.1. From this established evidence, there appears five alternative amounts to be considered in determining "loss", which are as follows:

First, the "loss" of $141,700.00 which represents the total amount of all fraudulent drafts and which amount was determined by the District Court as the "actual" and "intended" loss for sentencing purposes.

Second, the "loss" of $85,595.95 which represents the amount the bank sued for in January, 1993 prior to any charges against Petitioner.

Third, the "loss" of $44,910.00 which is

the amount actually received by this petitioner from all the fraudulent draft amounts (remember, the balance of these amounts went to Petitioner's Co-Defendant, Price).

Fourth, the "loss" is $28,510.00 which represents the difference of restitution paid by Petitioner and amount actually received from fraudulent drafts.

Fifth, no "loss" since the bank put all amount on "open account" and Petitioner intended no loss to the bank.

While there appears to be no Elventh Circuit cases directly on point, other than a "Fraudulent Law Application" case, United States v. Menichino, 989 F.2d 438 (11th Cir. 1993), there is a 1992 Tenth Circuit decision which is directly applicable to the facts and circumstances of Petitioner's case. In this case of Gallegos, just like Petitioner's case, the defendant had repaid a sum of money back to

the bank before sentencing and that the bank had previously sued the defendant for a sum certain which was different than the loss alleged in the presentence report. United States v. Gallegos, 975 F.2d 710, 712 (10th Cir. 1992).

In determining loss, it was therein held that "...the greater of actual or intended loss may be used to enhance, but "that actual loss should be measured by the net value, not the gross value of what was taken." (10th Cir. 1992); United States V. Gennuso, 967 F.2d 1460, 1461-1463 (10th Cir. 1992). The reasoning for accepting the reduced claim was because "it would be incongruous to hold that the "actual loss" to the bank was greater than the bank now seeks to collect." United States v. Gallegos, 975 F.2d 710, 713 (10th Cir. 1992). It was also stated that the District Court "...should consider the likelihood of repayment of the settlement amount and sentence accordingly."

United States v. Gallegos, 975 F.2d 710, 713 (10th Cir. 1992).

It would appear that the Appellee's argument that the "loss" should be $141,700.00 is based on the idea that no compromise settlement of a "loss" amount had been reached between Petitioner and the bank, as was the circumstances in the Gallegos decision. United States v. Gallegos, 975 F.2d 710, 712 (10th Cir. 1992). The Petitioner would contend that any compromised settlement agreement of a defendant with a bank really has nothing to do with the holding in Gallegos, since:

A. Despite any settlement amount, the bank still had a loss in Gallegos because the defendant did not repay any settlement amount but only a portion of the settlement amount, which resulted in a "net amount" owed the bank at the time of indictment. In Petitioner's case, this repayment before indictment also

resulted in a "net amount" since Petitioner had also not repaid all money sued for by the bank.

B. Gallegos made it clear that you cannot recover or seek to use the exposure to the bank, but only the net amount owed.

C. Regardless whether, as in Gallegos, the loss is a negotiated amount less any repayments, or in Petitioner's case, the loss is a full balance owed less repayments, the bottom line is "...that actual loss should be measured by the net value, not the gross value of what was taken." United States v. Gallegos, 975 F.2d 710,713 (10th Cir. 1992).

D. Any settlement really only limited exposure to the bank and had nothing to do with the amount owed the bank after voluntary repayments before indictments thus, the "loss" amount should represent the exposure to the bank at the time of indictment.

Despite this alleged difference between

Gallegos and Petitioner's cse, there are numerous consistencies between these two cases, which consist of:

A. Both cases involved a sum certain money loss to the bank;

B. Both cases involved substantial payments for repayment to the bank;

C. Both cases involved a suit filed by the bank for reduced sum certain; and

D. Both cases involved some balance remained owing to the bank after sentencing.

Regardless of the nature or type of bank fraud case, the "loss" should be the actual loss or intended loss, whichever is greater. United States v. Shaw, 1993 WL 312206 (9th Cir. Cal.); United States v. Menichino, 989 F.2d 438, 441 (11th Cir. 1993); United States v. Gallegos, 975 F.2d 710, 713 (10th Cir. 1992). Prior to sentencing, Petitioner "intended" no loss to the bank as evidenced by his pre-arrest

acknowledgement to the bank, the bank putting all amounts on an account, the efforts of Petitioner to repay all amounts, and his intention to repay the bank prior to any checks being returned and/or dishonored. The trial court disregarded all evidence as to Petitioner's "intended loss". Furthermore, any "actual loss" at the time of sentencing would not have been the amount used by the trial court since it failed to consider net value, how much the bank actually lost, and/or repayments. United States v. Shaw, 1993 WL 312206 (9th Cir. Cal.); United States v. Gallegos, 975 F.2d 710, 713 (10th Cir. 1992).

Therefore, the petitioner contends that the District Court erred in determining loss and that this case should have been remanded for appropriate determination.

Further, Petitioner contends that the loss amount to be used in determining the range of

punishment has been incorrectly calculated pursuant to 2F1.1 of the U.S.S.G., and there exists a disparity in the application of 2F1.1 of the U.S.S.G. among the Circuits. The chart below addresses the conflicts and the Commissions resolutions.

Circuit Conflicts Resolved by

Commission Amendment

19. Guideline Issue

In cases involving fraudulent loans, should the sentencing court determine the actual loss (e.g. account for collateral and payments on the loan) instead of the face value of the loan in the absence of a greater intended loss?

Circuit Decisions

Yes (Third, Fourth, Seventh, Tenth)

United States v. Kopp, 951 F.2d 521, 531-32 (3d Cir.1991).

United States v. Rothberg, 954 F.2d 217, 218-19 (4th Cir.1992).

United States v. Schneider, 930 F.2d 555, 557-58 (7th Cir.1991)

United States v. Smith, 951 F.2d 1164, 1166 (10th Cir.1991)

No (Second, Fifth)

United States v. Brach, 942 F.2d 141, 143 (2d Cir.1991).

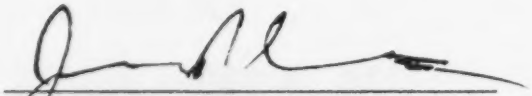
United States v. Cockerham, 919 F.2d 286, 289 (5th Cir.1990).

Petitioner contends that he is entitled to reconsideration of sentence by the trial court, and re-sentencing in accordance with Amendment 393 of the U.S.S.G.

CONCLUSION

WHEREFORE, the petitioner contends that this Honorable Court should grant his Petition for Writ of Certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit and remand the case to the trial court for a sentencing hearing consistent with the United States Sentencing Commission Guidelines, as applicable.

Respectfully submitted,



JAMES W. PARKMAN,III
401 NORTH FOSTER STREET
DOTHAN, ALABAMA 36303
(205) 793-9009

APPENDIX A

FROM THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO: 93-6610

UNITED STATES OF AMERICA

V.

WILLIAM JAMES DAVIS, JR.

Before Judge Anderson and Black, Circuit Judges, and Tuttle, Senior Circuit Judge.

In this appeal from a final judgment of conviction in a criminal case in the United States District Court for the Middle District of Alabama, the Petitioner, William James Davis, Jr., raises and presents to this Court the following issues:

1. Whether the Appellant is entitled to reduction in sentence due to the incorrect "dollar loss" attributable pursuant to U.S.S.G. Section 2F1.1.

2. Does a conflict exist in the decisions of the various circuit courts of appeal, and has the court of appeals failed to recognize the United States Sentencing Commissions Amendment addressing that conflict.

Affirmed. May 10, 1994.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO: 93-6610

UNITED STATES OF AMERICA V. WILLIAM JAMES DAVIS, JR.

Before ANDERSON and BLACK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on Rehearing En Banc (Rule 35, Federal Rules of Appellate Procedure); Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

DATED July 7, 1994.